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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re R.V., a Person Coming
Under the Juvenile Court Law.

B302546
(Los Angeles County
Super. Ct. No. CK87493C)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of the
of County of Los Angeles, Lisa A. Brackelmanns, Judge Pro
Tempore. Affirmed.

Linda B. Puertas, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kim Nemoy, Acting Assistant County Counsel, Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

J.M. (mother) appeals from the juvenile court's order terminating her parental rights to her son, R.V. (the child). According to mother, the court erred when it found that the parental benefit exception did not apply to the termination of her parental rights. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Petition

In early February 2017, the child's paternal aunt contacted the Department of Children and Family Services (Department) and reported that she had been caring for the child since November 2016 (when he was 17 months old). According to paternal aunt, mother had been kicked out of a sober living home in November after an altercation with another resident. She

believed mother was using methamphetamine again and was not caring for the child.¹

On March 15, 2017, the Department filed a Welfare and Institutions Code section 300² petition alleging that mother had left the child with paternal aunt without making an appropriate plan for his care and supervision and that her illicit drug use placed the child at risk of serious physical harm, damage, and danger.³ At the detention hearing, the court ordered the child

¹ The juvenile court previously exercised jurisdiction over the child due to mother's drug use, when he was four-months old, but subsequently terminated jurisdiction. Additionally, the court had terminated mother's parental rights to her two older children in 2013 and 2014.

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

³ In counts b-1 and g-1, the Department alleged: "In November . . . 2016, the the child[s] mother, . . . left the child with the child's paternal aunt, . . . and failed to make an appropriate plan for the child's care and supervision. [M]other's whereabouts were unknown to the child's paternal aunt. [M]other failed to provide the child with the basic necessities in life including food, clothing, shelter and medical care. [M]other failed to provide medical authorization for the child. [M]other's failure to make an appropriate plan for the child's care and supervision and failure to provide for the child endangers the child's physical health and safety and places the child at risk of serious physical harm and damage."

In count b-2, the Department alleged: "The child[s] mother . . . has a history of illicit drug use including opiates, amphetamine, methamphetamine[,] and marijuana which

detained from his parents and granted mother monitored visitation.

B. *Visitation in May 2017*

On May 5, 2017, mother had her first monitored visit with the child. During that month, mother participated in at least four monitored visits with the child, but cancelled two visits. Two other visits were cancelled because the child was sick. Mother was “affectionate, warm and loving” with the child and “interact[ed] closely” with him. But mother was “constantly shaking her leg and . . . snorting” during her visits. During one visit, mother smelled of marijuana and appeared to be under the influence.

renders . . . mother incapable of providing the child with regular care and supervision. The child’s siblings . . . received permanent placement services due to . . . mother’s substance abuse. The child is a prior dependent of the [j]uvenile [c]ourt due to . . . mother’s illicit drug use. [M]other has a criminal history of felony convictions for [drug-related offenses]. [M]other’s substance abuse endangers the child’s physical health and safety, placing the child at risk of serious physical harm, damage and danger.”

On May 18, 2017, the Department filed an amended petition alleging in count b-4 that mother had mental and emotional problems that made her incapable of caring for the child, endangered him, and placed him at risk of harm.

C. *Adjudication and Disposition Hearing*

At the June 1, 2017, adjudication hearing, the juvenile court sustained the petition as to counts b-1 and g-1, finding that the child was a person described in section 300. At the July 21, 2017, disposition hearing, the juvenile court declared the child a dependent child under section 300 and removed him from mother. The court denied mother reunification services, but granted her monitored visitation on the condition that she not fall asleep during visits.⁴

D. *Visitation from June 2017 to May 2018*

Mother visited the child on June 2, 14, 21, and July 6, 2017. But she cancelled visits scheduled for June 7, 8, 22, 28, and July 5, 2017. At visits during this period of time, mother exhibited “behaviors indicating that she may be [on] drugs.” Mother also repeatedly fell asleep during her visits. On July 6, 2017, mother brought drugs and drug paraphernalia in a sunglasses case to a monitored visit at the Department.⁵

During the month of August 2017, mother “often dozed off during the visits” and she “had to be reminded that she was not allowed to sleep during her visits with [the child].” She did not

⁴ As described below, mother had repeatedly fallen asleep during her visits.

⁵ In a July 21, 2017, last minute information, the social worker reported that mother “did not show up” for her July 7, 2017, drug test.

visit the child at all during the months of September and October 2017 because she was arrested in early September and apparently remained in custody through at least February 26, 2018.

E. *Section 388 Motion*

On May 4, 2018, mother filed a section 388 request to change the juvenile court's order denying her reunification services based on her successful participation in various programs during her incarceration and the months immediately following her release in February 2018. Mother requested that the court grant her reunification services or, in the alternative, unmonitored visitation conditioned on successful completion of her programs.

At the June 27, 2018, hearing, the juvenile court granted the motion, in part, ordering reunification services for mother and allowing monitored visitation for a minimum of six hours per week.

F. *Visitation from July 2018 to November 2019*

In a December 18, 2018, review hearing report, a social worker advised that the child appeared "to be thriving, happy and bonded with [paternal aunt]" and the aunt continued "to express that she [was] willing to provide a permanent home for [the child]." The social worker observed that mother's visits had progressed from monitored to unmonitored status. "[M]other [had] a strong bond with [the child]" and she was "affectionate, caring, attentive, and under[stood] age appropriate needs." The

social worker further advised that “[the child] appear[ed] to have [an] attachment with [mother]” and she played, ate, laughed, and talked with him.

In January 2019, mother was discharged from her drug treatment program and was homeless, which prevented the Department from further liberalizing visits. Around March 15, 2019, the social worker reviewed records from mother’s mental health program and observed that mother’s behavior had clearly declined. A team member from her program wrote that mother had “‘extreme mood irritability i.e. tearfulness, anger outbursts, agitation, unpleasant mood, all fluctuating within 5–10 seconds of each other.’”

During a March 28, 2019, visit with the child at the park monitored by paternal aunt, mother became ill immediately after eating lunch. Mother also told stories that paternal aunt had heard before, “was smacking her lips, twitching, couldn’t stay still, and [wore] her [sunglasses] . . . throughout the entire visit.” The next day, mother yelled at and used foul language with a social worker. In addition, mother had another visit with the child scheduled for April 4, 2019, but after paternal aunt and the child arrived at the park, mother called and cancelled, leaving the child “hurt and disappointed” The social worker spoke to the mother by telephone again on April 5, 2019, and mother “had rapid speech, used foul language, and had [a] verbal outburst that she was not able to manage.”

On April 8, 2019, mother was arrested for violation of Vehicle Code section 10851, subdivision (a)—unauthorized use of a vehicle—which violated the terms of her probation.

On May 1, 2019, the juvenile court terminated reunification services and set the matter for a section 366.26 hearing on

termination of parental rights, which hearing was continued a number of times.

In an August 2, 2019, section 366.26 report, the Department stated that during the reporting period, mother had weekly two hour visits with the child. Mother missed only two scheduled visits, but the social worker observed that during the visits mother fell asleep, talked to the child as if he were a friend, and told him that paternal aunt's boyfriend, whom the child called "daddy," was not his father.⁶ But the child appeared "happy" when he saw mother, hugged her, and called her "mom."

The social worker further reported that paternal aunt and her boyfriend continued to provide "stable and loving care for [the child] and [had met] all his physical, emotional, mental, and developmental needs."

At the beginning of a visit on September 10, 2019, in the child's presence, mother tried to bypass the security line, but was stopped by a security guard. Mother responded by yelling at the security guard, "[T]his is detrimental to my son!" and then shouted to someone at reception to call two social workers. Once in the visiting room, the child started to play with a fidget spinner that mother had brought. The spinner created a sound, which prompted mother to ask whether there was a microphone under the table. The monitor responded that the sound was emanating from the spinner, but mother disagreed. Mother also allowed the child to speak on the cell phone to an unknown male. When the monitor advised mother that the child was not permitted to speak to anyone without the permission of the social

⁶ It is not clear from the record what period "the reporting period" covered.

worker, mother began to yell and curse at the monitor and could be heard outside the visitation room. Mother then turned her attention to the child, held him in her arms, and would not let go. When a social worker entered the room and told mother that if she continued to yell, the visit would be terminated, mother yelled at the social worker to get out of her face while denying that she had yelled at anyone. The social worker advised mother that her visit was terminated and asked her to release the child. Mother refused to let go of the child, who started to cry in fear. Mother then yelled in the social worker's face, "Somebody get her out of my face." Mother continued to hold onto the child as she left the visitation room. Another social worker and a security guard responded, and the social worker was able to retrieve the child from mother.

On October 25, 2019, mother was incarcerated for possession of a controlled substance and on two outstanding arrest warrants for robbery and possession of unlawful drug paraphernalia.

E. *Section 366.26 hearing*

On November 19, 2019, the court began the section 366.26 hearing. Mother testified, among other things, that the child called mother "[m]om," "mama," and "mommy," and she considered herself his mother, despite the mistakes she had made. Mother felt she occupied a parental role in the child's life. According to mother, if the child threw a tantrum, she would ignore it or give him a four-minute time out. If the child hurt himself, "[h]e [did] not run to anybody but [mother]." When they

ended their visits, they “hug[ged] and . . . kiss[ed]” and the child would say, “Mommy, I love you.”

Following the end of mother’s testimony on November 22, 2019, the juvenile court heard argument and then ruled as follows: “The court does not find that . . . mother has met the burden to overcome . . . the fact that this child does need permanency, and the court does not find that the parental bond exception applies in this case. [¶] The court . . . [finds] it would be in the best interests of the child to have permanency and stability, which he has, living in the home that he currently is living in. [¶] . . . [¶] The court finds by clear and convincing evidence that the child is adoptable. [¶] The court finds it would be detrimental to the child to be returned to . . . mother at this time. [¶] And the court finds that no exception to adoption applies in this case.”

III. DISCUSSION

A. *Applicable Law*

“At a section 366.26 hearing, the juvenile court selects and implements a permanent plan for the dependent child.” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299, (*Noah G.*)) At this stage of the proceedings, the preferred plan is adoption. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 645.) “First, the court determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. [Citations.] Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can

demonstrate one of the enumerated statutory exceptions applies.” (*Id.* at pp. 645–646.)

“The parental benefit exception applies when there is a compelling reason that the termination of parental rights would be detrimental to the child. This exception can only be found when the parents have maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 (*Anthony B.*); accord, *In re E.T.* (2018) 31 Cal.App.5th 68, 75–76.) For the benefit prong of the exception, “[t]he issue . . . is not whether there was a bond between [the parent] and [the child]. The question is whether that relationship remained so significant and compelling in [the child’s] life that the benefit of preserving it outweighed the stability and benefits of adoption.” (*Anthony B., supra*, 239 Cal.App.4th at p. 396.)

Various factors affect the parent-child bond, including “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) “[A] parental relationship is necessary for the exception to apply, not merely a friendly or familiar one.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*)). “Evidence of frequent and loving contact is not enough to establish a beneficial parental relationship.” (*Noah G., supra*, 247 Cal.App.4th at p. 1300.) “The juvenile court may reject the parent’s claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong

preference for adoption.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

B. *Standard of Review*

There is a split of authority regarding the appropriate standard of review for determining whether the parental benefit exception to the termination of parental rights applies. (See *In re Caden C.* (2019) 34 Cal.App.5th 87, 106, review granted July 24, 2019, S255839.) “We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child.” (*Anthony B.*, *supra*, 239 Cal.App.4th at p. 395.)

C. *Analysis*

Mother contends that the juvenile “court’s finding that [the child] did not share a beneficial relationship with [m]other was not supported by substantial evidence.” We disagree.

Contrary to mother’s assertion, the record demonstrates that mother’s visitation with the child during the pendency of this action was far from consistent. Mother had left the child with paternal aunt in November 2016. The Department filed the petition on March 15, 2017, and mother did not participate in her first monitored visit with the child until months later, on May 5, 2017. During the ensuing three months, mother’s visits were inconsistent and the evidence suggests that she was using drugs during that time.

Mother failed to visit the child at all during September and October 2017, apparently because mother was in custody from September 2017 to February 26, 2018. And, although mother did begin to visit with the child regularly following the grant of her section 388 motion and reunification services in late June 2018, by April 2019, mother's mental status had deteriorated and included "extreme mood irritability" and angry phone calls with social workers. Mother appeared to be under the influence during a visit with the child in the park in late March 2019 and she cancelled another visit in early April at the last minute. Soon after that, mother was arrested again.

Following termination of reunification efforts in May 2019, the Department observed that mother's visits were limited to one day per week for two hours and, although mother consistently visited, she continued to fall asleep during visits.

Further, even if we were to assume for purposes of this opinion that mother had maintained regular visitation and contact with the child, we would conclude that the court did not err. In support of her argument that the child would significantly benefit from a continuing relationship with her, mother relies on *In re E.T., supra*, 31 Cal.App.5th 68 and argues that the facts in that case closely parallel the record here. But there, the record showed that the mother had lived with her twins almost as long as they had been living with the prospective adoptive parents. (*Id.* at p. 77.) She also visited with the children as often as permitted by social workers and stayed in telephone contact in between visits. (*Id.* at p. 76.) Moreover, the Department in that case believed the mother "should always be a presence in the children's lives." (*Ibid.*) And, despite the termination of services, the mother continued to successfully participate in programs

designed to maintain her sobriety and make her a better parent. (*Id.* at p. 72.) Among other things, the mother consistently tested negative for drugs and remained in her drug treatment program. (*Ibid.*)

Here, by the time of the November 2019, section 366.26 hearing, the child was four years old and had lived continuously with paternal aunt since he was 17 months old. Further, although the child had some positive visits with mother, he had negative visits with her as well. Mother brought drugs to at least one visit, appeared to be under the influence of drugs on other visits, and also fell asleep during numerous visits. Finally, mother had scared the child during a visit in September 2019, when she refused to let go of him and yelled and cursed at various people during her visit. Moreover, the court was entitled to credit the social worker's observation that mother spoke to the child as a friend rather than as a parent over mother's testimony that she had a parental relationship with him. The court therefore did not abuse its discretion in concluding that mother's relationship with the child was not so significant and compelling that preserving it outweighed the stability and benefits of adoption.

IV. DISPOSITION

The order terminating parental rights is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.